

ORIGINAL

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

JOSEPH P. DONOVAN

APPELLANT

VS.

Case #2014-CP-01600

**G. TODD BURWELL, INDIVIDUALLY
LATHAM & BURWELL, PLLC, UNKNOWN
CORPORATIONS A-J AND JOHN DOES 1-10**

APPELLEE

**ON APPEAL FROM
THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2013-203-C**

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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**G. TODD BURWELL, INDIVIDUALLY
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CORPORATIONS A-J AND JOHN DOES 1-10**

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned, Joseph P. Donovan, *Pro Se*, certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Hon. Frank G. Voller, Specially Appointed Circuit Court Judge, Rankin County, Mississippi, Twentieth Circuit Court District, P.O. Box 1689, Brandon, Mississippi 39043
2. Alexander Frederick Guidry 125 S. Congress St., Ste. 1820, Jackson, MS 39201
3. Michael Thomas Jaques, 240 Trace Colony Park Drive, Ridgeland, MS 39157
4. Harris H. Barnes, III, 5 River Bend Pl., Suite A, Flowood, MS 39232
5. Keith D. Obert, Obert Law Group, P.O. Box 2081, Madison, MS 39130
6. Joseph P. Donovan, 104 Carburn Court, Brandon, MS 39047

By: _____

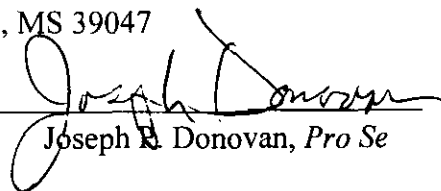

Joseph P. Donovan, *Pro Se*

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STATEMENT OF THE ISSUES

The trial court erred in granting the Burwell Defendants' Motion for Summary Judgment as the trial court improperly used the hearing dates as opposed to the order issuance dates to impute knowledge of malpractice onto Joseph P. Donovan so as to trigger the discovery rule and begin the running of the applicable statute of limitations, as **consistently misrepresented by the Burwell Defendants'** in all of their correspondence with the trial court with regard to summary judgment.

The trial court erred in granting the Burwell Defendants' Motion for Summary Judgment, as Joseph P. Donovan established for the trial court the existence of genuine issues of material fact as to when the statute of limitations began to run in the legal negligence case against the Burwell Defendants.

The trial court also erred by stating in its opinion that because new counsel was able to get the IRS to concede regarding the timeliness and the liability of the taxes, Burwell did not commit malpractice. The fact that the issue was conceded by the IRS does not alone make the matter of malpractice dispositive. Per the affidavits submitted by Donovan, what Burwell had done was not sufficient to get relief for Donovan as the new counsel had done. As such, summary judgment was improper.

STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This is an appeal from an order of the Circuit Court of Rankin County, Mississippi granting summary judgment to the Appellees, G. Todd Burwell, individually, Latham & Burwell, PLLC, Unknown Corporations A-J, and John Does 1-10 in a legal malpractice case brought by the Appellant, Joseph P. Donovan, individually.

The initial action was filed on January 7, 2011 in the Circuit Court of Rankin County, Mississippi, alleging malpractice by the Burwell Defendants in their representation before the Mississippi State Tax Commission and the IRS.

B. STATEMENT OF THE RELEVANT FACTS

Mississippi State Tax Commission Representation

Joseph P. Donovan (hereinafter, "Donovan") owned an interest in and served as officer of two ambulance companies, EmeryStat, Inc. and EmeryStat of Sulligent, Inc. In July 2006, the Mississippi State Tax Commission (hereinafter, the "Tax Commission") assessed Donovan with personal liability as a responsible person for unpaid state payroll taxes due from EmeryStat, Inc. in the amount of \$1,010,338.72. On October 4, 2006, Donovan formally retained G. Todd Burwell and Latham & Burwell, PLLC (hereinafter collectively, "Burwell") to represent him to contest the assessment. On October 5, 2006, Burwell represented Donovan at a hearing before the Tax Commission's Board of Review. On November 15, 2006, the Tax Commission's Board of Review issued its order where Donovan's liability was upheld and reduced to \$409,838.39.

On December 15, 2006, the deadline to appeal the Tax Commission's Board of Review order was missed due to a transposing error on the part of Burwell. After filing a late appeal, the

appeal was rejected by the Tax Commission. Burwell explained the error to the Tax Commission and the appeal was eventually accepted.

The appeal before the Tax Commission was heard on August 15, 2007. The Tax Commission subsequently issued an order on May 28, 2008 upholding the order of the Tax Commission's Board of Review. Burwell then appealed the Tax Commission's assessment to the Rankin County Chancery Court. At this hearing, Donovan was unable to post the necessary appeal bond required by Miss. Code Ann. § 27-77-7(3) and as a result, the appeal was dismissed on March 3, 2009.

IRS Representation

The IRS notified Donovan on August 28, 2007 via an "1123 Letter," that he was a "responsible person" and was liable for both Emergystat companies' unpaid federal payroll taxes. Donovan had 60 days from the date of the letter to appeal. Burwell agreed to represent Donovan in his protest of the IRS assessment. Burwell mailed the Formal Protest to Janet Oakes, Donovan's IRS case manager, on October 26, 2007. On January 14, 2008, Burwell learned the IRS decided that Donovan's Formal Protest was not timely submitted by the due date. On January 15, 2008, Burwell wrote the IRS contesting the IRS's position and enclosing three affidavits from Burwell attesting that the Formal Protest was timely mailed. The Defendants continued representing Donovan before the IRS through 2008, contesting the IRS's collection of the taxes.

On March 3, 2009, Burwell withdrew from representation and Donovan retained Barnes Law Firm, P.A. of Flowood, Mississippi to represent him before the IRS. On February 1, 2010, the IRS issued a Notice of Determination holding that the tax was properly assessed against

Donovan. On March 4, 2010, Donovan, through his new counsel, filed a petition with the U.S. Tax Court appealing the assessment.

On May 6, 2013, the U.S. Tax Court convened in Jackson, Mississippi to hear Donovan's appeal. The IRS moved for summary judgment arguing the Formal Protest was not timely. Donovan argued that the Formal Protest was timely according to the IRS rules and facts and circumstances regarding the filing. During oral argument, the IRS conceded the timeliness of the filing. Eventually, the new counsel successfully managed to have all IRS assessments dismissed.

SUMMARY OF THE ARGUMENT

In appealing the *Final Judgment* issued by the trial court, Donovan asserts that he is entitled to a reversal of the Rankin County Circuit Court's order granting summary judgment to Burwell. The statute of limitations in a legal malpractice action properly begins to run at the date the client learns or through the exercise of reasonable diligence should learn of negligence of his lawyers.¹ Further, the Court has said that the discovery rule is to be applied when the Plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question, or it may be applied when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act.² For legal malpractice, a three year statute of limitation applies.³

Here, Donovan faithfully relied on his attorney, Burwell, up and until Burwell's withdrawal on March 3, 2009 and followed the proper appellate channels. Donovan filed the *Complaint* in trial court on January 7, 2011.⁴ The trial court stated that in applying the discovery rule, that Donovan had until October 4, 2009, three years after the Tax Commission Board of Review assessment was issued, or at the latest August 15, 2010, three years after the assessment was upheld by the Tax Commission and just less than five months before Donovan filed the *Complaint*.⁵

The trial court erred by following Burwell's misleading and confused the hearing dates with the order dates. Donovan could not have known of any malpractice on the dates proscribed by the trial court in its opinion because on the dates used by the trial court because on those dates, no orders had been given. The trial court erroneously used the hearing dates as the dates

¹ *Channel v. Loyacono*, 954 So.2d 415 (Miss. 2004)

² *Id.*

³ Miss. Code Ann. § 15-1-49

⁴ R. at 10

⁵ R. at 275

where the statute of limitations could have accrued while at the same time also stating that those specified dates were in fact the dates the liabilities were either imposed or upheld.⁶ This is not only impossible, but is grossly incorrect. The problem with the trial court's logic is that Donovan could not and in fact did not have knowledge of the administrative hearing losses before the orders were issued. The two possible dates, per the trial court's logic of imputing knowledge when Donovan became aware of or should have become aware of the losses, should have been November 15, 2010 and May 30, 2011, the dates the actual orders were issued. With the *Complaint* being filed on January 7, 2011, it would be within the trial court's discernable window creating a genuine issue of material fact, thus making summary judgment improper.

Next, it would be fundamentally unfair to impute and assume notice of legal malpractice, actual or constructive, based solely upon a loss at any level, especially at the administrative level. Further, it was not taken into account by the trial court that Donovan remained engaged with Burwell up to the Chancery Court hearing on March 9, 2009. Maintaining a fiduciary relationship when Donovan knew or should have known of legal malpractice seems to run contrary to actual knowledge of legal malpractice. It would seem normal for a client to remain with his attorney to appeal to the next level. Thus it is unfair and improper to impute constructive or actual knowledge of legal malpractice upon Donovan upon mere administrative losses.

The trial court also erred by stating in its opinion that because new counsel was able to get the IRS to concede regarding the timeliness and the liability of the taxes, Burwell did not commit malpractice.⁷ The fact that the issue was conceded by the IRS does not alone make the matter of malpractice dispositive. In his *Complaint*, Donovan alleges not only the fact that

⁶ R. at 275

⁷ R. at 276

Burwell was untimely in his filings with the IRS, but also that Burwell did not take all other reasonable and prudent measures in defending him against the allegations that the IRS asserted. The new counsel for Donovan was able to quickly get the matter resolved; Burwell did not. Donovan incurred substantial legal fees as a result. Because of the foregoing, summary judgment was improper.

Because Burwell did not conclusively establish there was no genuine issue as to any material fact that Donovan had or should have had knowledge of the alleged wrongdoing during the course of representation, Burwell was not entitled to summary judgment. In this case, the pivotal question is whether Donovan knew or should have known that Burwell committed any wrongdoing and when he knew or should have known. As such, summary judgment is not appropriate and this matter should proceed to trial on the merits.

STANDARD OF REVIEW (SUMMARY JUDGMENT)

The Supreme Court applies a *de novo* review to the grant of summary judgment.⁸ When reviewing the evidence on summary judgment, the Court should view the evidence in the light most favorable to the nonmovant.⁹ A dispute regarding a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party.¹⁰ Viewing the evidence in this light, summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹¹ The moving party bears the burden of showing that no genuine issue of material fact exists.¹² “The non-moving party must produce specific facts showing that there is a genuine material issue for trial.”¹³ The nonmoving party is given the benefit of every reasonable doubt as to the existence of a genuine issue of material fact.¹⁴ If the moving party fails to meet this burden, the motion must be denied regardless of the nonmovant’s response.¹⁵ The *de novo* standard also applies on review of the trial court’s application of the statute of limitations.¹⁶

⁸ *Bennett v. Hill-Boren, P.C.*, 52 So.3d 364 (2011) (citing *Fletcher v. Lyles*, 99 So.2d 1271, 1276 (Miss. 2009))

⁹ *Bennett v. Hill-Boren, P.C.*, 52 So.3d 364 (2011)

¹⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)

¹¹ Miss. R. Civ. P. 56(c)

¹² *Van v. Grand Casinos of Miss., Inc.*, 767 So.2d 104, 1017 (Miss. 2000)

¹³ *Id.* at 1018.

¹⁴ *Id.* at 1017

¹⁵ *Id.*

¹⁶ *Fletcher v. Lyles*, 99 So.2d 1271, 1276 (Miss. 2009)

ARGUMENT

The trial improperly granted the motion for summary judgment submitted by Burwell. Donovan has established genuine issues of material fact as to when the statute of limitations began to run in the legal negligence case. First and foremost, the trial court clearly misapplied the hearing dates instead of the order dates as it seemed to want to do in the application of the discovery rule. With those dates corrected, Donovan was in a proper time frame to file and Donovan did file within the proper statute of limitations period. Next, it is patently unfair to impute knowledge on any plaintiff in a legal malpractice action solely on the virtue of an appealable loss at an administrative level, or any level for that matter. Since it would be unfair to impute such knowledge or malpractice or to assume that malpractice should have been recognized due to an administrative level loss, especially when the client continues the engagement with counsel for another appeal, summary judgment is not and would not be proper. Further, Burwell did not establish that there was no genuine issue as to any material fact with regard to when the statute of limitations began to run and whether the IRS matter was handled negligently. For all the reasons foregoing, summary judgment in this case was not proper.

Substantive law defines “genuine” issues and “material” facts to those issues.¹⁷ The moving party bears the initial burden of production and burden of persuasion that no genuine issues exist. In other words, “the movant has the job of persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, [the moving party] is entitled to judgment as a matter of law.”¹⁸

¹⁷ *Mallery v. Taylor*, 805 So.2d 613, 620 (Miss. App. 2002), (citing *Sherrod v. U.S.F. & G.*, 518 So.2d 640, 643 (Miss. 1987))

¹⁸ *Fruchter v. Lynch Oil Co.*, 522 So.2d 195, 198 (Miss. 1988)

The applicable statute of limitations for legal negligence actions is defined in Miss. Code Ann. § 15-1-49 as a three-year period.¹⁹ Mississippi adheres to the “discovery rule,” that holds that the cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury.²⁰ Under the discovery rule, as applied in Mississippi in legal malpractice actions, the statute of limitations begins to run on the date that the plaintiff learns, or through reasonable diligence, should have learned, of the negligence of the lawyer.²¹ The discovery rule is applied when the facts indicate that “it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act.”²² As the Supreme Court of Mississippi has stated before, the discovery rule applies in legal malpractice because **requiring a layperson to ascertain legal malpractice at the time it occurs would necessitate the retention of a second attorney to review the work of the first.**²³ In seeking his appeals, Donovan relied on his counsel continuously and had no real reason to believe that as long as appeals were viable, he should hire another counsel to review the first counsel’s work. As such, there was no reason for Donovan to believe he was the victim of malpractice.

Further, notwithstanding the fact that Donovan eventually won his IRS issues, Burwell did not resolve those issues. In the end, Donovan had to hire another attorney to review Burwell’s work, address the issues with the IRS, and resolve all of Donovan’s outstanding matters with the IRS that Burwell could not resolve. As such, the eventual win is no reason to dismiss this claim as the trial court did in granting summary judgment. Because another attorney

¹⁹ *Channel*, 954 So.2d at 415

²⁰ *Smith v. Sneed*, 638 So.2d 1252 (Miss. 1994); *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990)

²¹ *Smith*, 638 So. 2d at 1253

²² *Bennett*, 52 So.3d at 369 (citing *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788, 794 (Miss. 1998) (overruled on other grounds))

²³ *Bennett*, 52 So.3d at 369 (citing *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 98 Cal.Rptr. 837, 491 P.2d 421, 428 (1971)) (emphasis added)

had to be hired, further fees were incurred, and the matter was eventually resolved with further, time, money, and effort on Donovan's part. Damages, and more importantly, genuine issues of material fact as to Burwell's malpractice in the matter still remain. As such, summary judgment was not proper.

Since Burwell did not establish conclusively that Donovan did not file within the appropriate time period, that Donovan had or should have had knowledge of malpractice, and that just because of the concession by the IRS and eventual success of Donovan with the assistance of other counsel, summary judgment was not proper in this case since genuine issues of material fact remained.

1. The trial court incorrectly assumed orders were issued on the hearing dates, thus wrongfully imputing knowledge on Donovan of malpractice on the hearing dates instead of the dates of the orders as the trial court intended.

The trial court used the wrong dates for measuring what it believed to be proper possible accrual dates for the statute of limitations period and the tolling of the same. The court stated in the *Opinion* that the Tax Commission Board of Review and the Tax Commission assessed and upheld the liability on October 5, 2006 and August 15, 2007.²⁴ Those dates were merely the hearing dates and accordingly, no order was given. Therefore, there was no tax assessed or upheld on either of those dates, thus there was no loss on either date. **The actual dates of the orders were November 15, 2006 and May 28, 2008.**²⁵ Therefore, Donovan could not have known about the ruling itself or the upholding of the ruling by the Tax Commission until those orders were actually released. As such, the trial court miscalculated the statute of limitations as

²⁴ R. at 275

²⁵ *Id.* at 104, 105 (emphasis added)

applied. The appropriate dates, under the trial court's logic, to bring a malpractice action would have been between November 15, 2009 and May 30, 2011, after the filing of the *Complaint*.

The words of the trial court in its *Opinion* were:

This court find[s] that the time when the **Plaintiff was put on notice of possible negligence of these defendants, as lawyers was October 5, 2006**, when after the hearing before the Tax Commission Board of Review, at which he was represented by Defendants, **the Board of Review assessed tax liability against the Plaintiff** as a responsible person in the amount of \$409,838.39. This liability the Plaintiff contested and denied. **This notice of possible negligence was reaffirmed on August 15, 2007 when the Tax Commission upheld on the merits of the assessment of that tax.**²⁶

The words the trial court should have used, had the trial court applied the correct dates in applying the same logic are:

This court finds that the time when the Plaintiff was put on notice of possible negligence of these defendants, as lawyers was **November 15, 2006**, when after the hearing before the Tax Commission Board of Review, **the Board of Review issued its ruling** assessing tax liability against the Plaintiff as a responsible person in the amount of \$409,838.39. This liability the Plaintiff contested and denied. This notice of possible negligence was reaffirmed on **May 28, 2008 when the Tax Commission issued its ruling** upholding on the merits of the assessment of that tax.

As such, in the trial court's reasoning, it was stated that because of the knowledge of the losses on the above dates, "*The Plaintiff had until October 4, 2009 or at the latest August 15, 2010 to bring a malpractice action. His Complaint was not filed until January 7, 2011 and is therefore barred under § 15-1-49 Miss Code Ann. 1972.*"²⁷ Applying the corrected dates, the *Opinion* should read, "The Plaintiff had until November 16, 2009, or at the latest May 30, 2011."

It would seem the trial court was grossly misled by Burwell into closing off the statute of limitations period. In Burwell's *Motion for Summary Judgment*, Burwell references a Tax

²⁶ R. at 275 (emphasis added)

²⁷ *Id.*

Commission's Board of Review hearing on October 5, 2006 and the respective order on November 15, 2006 as well as a hearing **and order** on August 15, 2007 in front of the Tax Commission where the Tax Commission upheld its Board of Review's order on the merits.²⁸ Burwell conveniently leaves out the fact **this order was actually issued on May 28, 2008.**²⁹ In Burwell's *Memorandum in Support of Motion for Summary Judgment*, Burwell again neglects to acknowledge the fact that the order from the Tax Commission came out on May 28, 2008, and instead wrongfully references the supposed "fact" that the Tax Commission upheld the Board of Review's order on the hearing date, August 15, 2007.³⁰ In Burwell's own *Reply in Support of Motion for Summary Judgment*, where Burwell again has a chance to correct his gross misrepresentation, Burwell states again "If Donovan believed he should have 'won' but for the Defendants' representation, any alleged malpractice claim Donovan had against Defendants accrued at the earliest of November 15, 2006 **and the latest of August 15, 2007 when the State Tax Commission upheld its assessment of payroll taxes against him.**"³¹ Burwell again correctly uses the order date for the November 15, 2006 as the first possible date, yet uses the hearing date of August 15, 2007, where no order was given, as the second possible date.³² This seems to be the only date Burwell confuses on a regular basis. Burwell remains steadfast and correct in properly citing the order dates instead of the hearing dates with the orders from the U.S. Tax Court, Chancery Court of Rankin County, and the Tax Commission's Board of Review, **when it does not negatively impact Burwell.**³³ The functional result of this misrepresentation

²⁸ *Id.* at 95

²⁹ *Id.* at 105

³⁰ *Id.* at 139

³¹ *Id.* at 261(emphasis added)

³² *Id.*

³³ *Id.* at 95, 98, 261

is the latest possible date that Burwell argues the statute of limitations could have accrued on is pushed before the date the *Complaint* was filed. This is most convenient.

Both the trial court in the *Opinion*, and Burwell in the record refer to Donovan's belief and what he knew.³⁴ He rightfully did not and would not know anything until an order was issued, thus the utilization of the hearing dates is wholly improper. Burwell, either intentionally or accidentally, yet very conveniently, misled the trial court into using the hearing date where the *Complaint* would have absolutely been outside the statute of limitations. That Tax Commission appeal date is significant in that it opens the possible window for the discovery rule such that the *Complaint* would have been timely. Therefore, the date on which the order was rendered is a material fact for which there is a very genuine issue. Therefore, had the proper dates been used, it would have been clear that summary judgment would have been improper, because there would have been a genuine issue of material fact since the filing of the *Complaint* would have fallen into the window proscribed by Burwell and the trial court. Certainly, when even the movant himself cannot conclude one way or the other as to when the statute began to run, summary judgment would be improper.

Further, because the trial court hinged its imputation of knowledge of legal malpractice on Donovan on the dates of the assessment and upholding of tax liability, the trial court itself misapplied the statute of limitations. Using the corrected window of between November 16, 2009 and May 30, 2011, the trial court should not have granted summary judgment. In its *de novo* review, this Court should give nonmoving party the benefit of every reasonable doubt as to the existence of a genuine issue of material fact and conclude that summary judgment in this case was improper given that even the trial court itself could not reach a proper conclusion as to when Donovan should have known of Burwell's negligence.

³⁴ *Id.* at 144, 261, 262, 272

Burwell may raise the issue of statute of limitations still, by saying notwithstanding the dates above, the trial court properly granted summary judgment because the filing of the *Complaint* could have and likely did still fall on a date outside the appropriate statute of limitations. This simply does not meet the movant's burden for summary judgment. If anything, this is the very definition of a genuine issue of material fact. Burwell cannot absolutely place the *Complaint*, without a doubt, outside the applicable statute of limitations period. As such, summary judgment should not have been granted.

2. The statute of limitations was tolled by the discovery rule since Donovan did not know of and did not have reason to know of Burwell's negligent actions until at least the Chancery Court dismissal.

This Court should also recognize that a loss alone should not be enough to impute knowledge onto Donovan that legal malpractice was committed. The Supreme Court of Mississippi has stated before that the discovery rule is applied when the facts indicate that "it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act."³⁵ That Court has also stated before, the discovery rule applies in legal malpractice because **requiring a layperson to ascertain legal malpractice at the time it occurs would necessitate the retention of a second attorney to review the work of the first.**³⁶ The Court has consistently ruled in many cases contrary to Burwell's and the trial court's assertion that Donovan should have known on the dates that rulings were either issued or upheld.

In *Champluvier v. Beck*, an attorney for a businesswoman, pressed by an estate to provide information involving business matters and file inventories and accountings with the court,

³⁵ *Bennett*, 52 So.3d at 369, (citing *McCain v. Memphis Hardwood Flooring Co.*, 725 So.2d 788, 794 (Miss. 1998) (overruled on other grounds))

³⁶ *Id.* (citing *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal.3d 176, 98 Cal.Rptr. 837, 491 P.2d 421, 428 (1971)) (emphasis added)

seemed to perform poorly at his job.³⁷ Beck, the attorney, did not help his client, Champluvier, provide all the documents requested by the court; and upon providing some documents, the documents were found to not be compliant with the orders of the court.³⁸ As a result, on July 19, 1999, Ms. Champluvier was held in contempt and incarcerated for twenty eight (28) hours.³⁹ Further, on August 16, 1999, Ms. Champluvier fired Beck.⁴⁰ On August 20, 1999, Beck filed a motion to withdraw.⁴¹ On September 1, 1999, a complaint was filed with the Mississippi Bar.⁴² Champluvier filed a complaint against Beck on March 14, 2003.⁴³ The court stated that based on the facts of this case, Champluvier should have reasonably known of Beck's alleged deficient performance prior to the order letting Beck withdraw on August 22, 2000.⁴⁴

In another case, a man by the name of Hymes was sentenced to thirty-five years in prison, and in 1995, he pursued a post-conviction relief based on ineffective assistance of counsel.⁴⁵ Hymes conviction was vacated in 2000 and soon thereafter he filed a legal malpractice suit against his attorneys.⁴⁶ This case was dismissed because the statute of limitations began to run in 1995 when it became apparent to Hymes that his attorney's performance was deficient.⁴⁷

These two cases above tend to illustrate that in Mississippi, a court loss does not *per se* necessarily equate to malpractice or impute knowledge of malpractice to the losing party. In Donovan's case, it seems unlikely that any reasonable person or a Mississippi court, upon a reflection of the case law applying the discovery rule, would equate a loss as malpractice. There

³⁷ *Champluvier v. Beck*, 909 So.2d 1061 (Miss. 2004)

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Hymes v. McIlwain*, 856 So.2d 416 (Miss. Ct. App. 2003)

⁴⁶ *Id.*

⁴⁷ *Id.*

is always a loser in court, and sometimes both sides seem to lose. But, if this were the measure for imputing knowledge on a party as to an attorney's deficient performance, a large portion of the case law relating to the discovery rule could be disposed of as we would simply measure the statute of limitations period by the date of any type of loss where a party is represented. Further, an order would have to be given to even know of the loss if a loss were to be the measure for imputing knowledge.

With regard to Donovan, the trial court states that at the latest, the statute of limitations absolutely expired three (3) years after the hearing date of the second administrative appeal, but stated that it was also when the Tax commission upheld the ruling of the Tax Commission's Board of Review.⁴⁸ It would seem that in light of *Hymes*, the trial court did not act properly in applying the discovery rule. A losing case is not one in which a party should immediately assume malpractice. To do so, would make each and every loss for an attorney that much more risky. It would seem against public policy. Regardless, *Hymes* and *Champluvier* did not impute knowledge to the represented party upon a loss, and in both cases the Court showed willingness of entertaining application of a more liberal discovery period. In Donovan's case, only five (5) months are needed, under the trial court's application. Further, disposal via summary judgment seems improper if there were a contest as to whether the period had expired. That question of when the statute of limitations period expires is a genuine issue of material fact.

In light of *Hymes* and *Champluvier*, the assumption of the court seems improper as the question of whether the statute of limitations is tolled by the discovery rule often turns on the factual determination of what the plaintiff knew and when, and thus, occasionally the question of whether the suit is barred by the statute of limitations is a question of fact for the jury, however,

⁴⁸ R. at 275

as with other putative fact questions, the question may be taken away from the jury if reasonable minds could not differ as to the conclusion.⁴⁹

It may be argued, as Burwell and the trial court concluded, that knowledge was properly imputed on these dates as Donovan likely felt he should have won, but for Burwell's poor representation. Further the trial court states raises the Rule 56(e), as a reason to grant summary judgment stating that Donovan could not rest merely on the pleadings. The affidavits of Donovan and of Harris H. "Trip" Barnes reject the assertions of Burwell.⁵⁰ Further, Donovan formally responded with his *Plaintiff's Motion to Stay Proceedings, Response to Motion for Summary Judgment and Motion for Continuance to Allow Completion of Discovery* including with it his affidavits.⁵¹ Notwithstanding any of the above, two significant facts remain (1) Donovan remained engaged with Burwell all the way until the Chancery Court of Rankin County and had not raised any issues or filed any bar complaint relating to representation by Burwell (See *Champluvier*) and (2) Burwell conveniently used the wrong dates in his motion, memorandum in support, and reply.⁵² As such, even without response, Burwell had not met his burden. As such, summary judgment was improperly granted.

3. The trial court improperly concluded that because of the IRS concession as to timeliness of filing that no malpractice can be asserted in regard to the entire representation before the IRS.

The trial court stated that since the IRS conceded that the protest of the tax asserted by the Federal Government was eventually conceded by the IRS to be timely filed by Burwell and even dismissed the tax on subsequent hearing, no malpractice could be asserted against

⁴⁹ *Stinger v. Trapp*, 30 So.3d 339 (Miss. 2010).

⁵⁰ R. at 163, 166

⁵¹ *Id.* at 148

⁵² *Id.* at 95, 139, 144, 261

Defendants in regard to that representation.⁵³ Burwell also argued in his *Reply in Support of Summary Judgment* that Donovan would have to show by a preponderance of the evidence that a lawyer-client relationship existed, negligence was committed on the part of the lawyer handling the client's affairs entrusted to him, and proximate cause of the injury.⁵⁴ Burwell's argument revolves around the proximate cause of the injury and whether Donovan would be successful in prosecution of the underlying action.⁵⁵ The argument of Burwell is summed up by stating that because the Formal Protest was filed and the IRS claims are now dismissed, Donovan cannot prove negligence, proximate cause, injury, or damages.

Notwithstanding the fact that the IRS conceded the issue of liability and dismissed all assessments for taxes owed, Donovan still incurred damages as a result of Burwell's negligent handling of the case in the form of attorney's fees and emotional distress. Further, pursuant to the Rule 56(e) issue mentioned herein, Donovan submitted two affidavits in his response to Burwell's *Motion for Summary Judgment* from himself and Harris H. "Trip" Barnes showing genuine issues of material fact that there was a negligent handling, attorney-client relationship, proximate cause, and damages.⁵⁶ Burwell chose to use a postage meter for Donovan's mailings to the IRS instead of sending under the proscribed method of using certified or registered mail, which would have resulted in no question of timeliness. Although eventually timely, Burwell caused additional risk to be taken on by his client, Donovan. As a result of the metering, a would-be non-issue such as timeliness of mailing came into question and Donovan was forced to incur substantial costs in unwinding such a small issue.⁵⁷ Specifically, in the affidavit from

⁵³ R. at 273

⁵⁴ *Id.* at 263 (citing *Lancaster v. Stevens*, 961 So.2d 768, 771 (Miss. Ct. App. 2007))

⁵⁵ *Id.* at 263

⁵⁶ *Id.* at 163, 166

⁵⁷ R. at 167

Harris H. "Trip" Barnes, Mr. Barnes states that because of the efforts of his firm, he was able to get the case heard by the U.S. Tax Court and then resubmitted to an appeals officer.⁵⁸ Mr. Barnes went further to say that notwithstanding the technical error with regard to mailing, the facts were insufficient to give relief to Donovan anyway.⁵⁹ Because Donovan has produced genuine issues of material facts, summary judgment was improper.

⁵⁸ R. at 169

⁵⁹ *Id.*

CONCLUSION

Because the trial courts misapplied the dates for which the statute of limitations accrued and therefore improperly applied the statute of limitations and because Burwell did not show that there was no genuine issue as to any material fact as to when Donovan knew or should have known Burwell committed malpractice, the summary judgment, granted by the trial court, was granted in error. Further, because even though the IRS conceded at the Tax Court, genuine issues of material facts remain with regard to the malpractice case stemming from the IRS representation. Accordingly, this Court should reverse the decision of the trial court below and remand this matter to the Circuit Court of Rankin County to be decided on the merits.

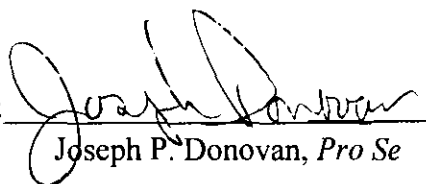
CERTIFICATE OF SERVICE

I, Joseph P. Donovan, Appellant, *Pro Se*, certify that I have this day filed this Brief of Appellant the Clerk of this Court with the Clerk of this Court, and copies of same via U. S. First Class Mail to the following:

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SO CERTIFIED, this the 21st day of April, 2015.

By: 
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